United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7337

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United States Court of Appeals

For the Second Circuit.

THOMAS HUGHES,
Plaintiff-Appellant,

against

LOUIS J. FRANK, Commissioner of Police of the Nassau County Police Department, and the NASSAU COUNTY POLICE DEPARTMENT,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF OF PLAINTIFF-APPELLANT.

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BRIEF OF PLAINTIFF-APPELLANT.

Background of the Case.

Plaintiff-appellant is a police officer employed by the County of Nassau, State of New York, and continues in that capacity to date.

That, prior to becoming a member of the Nassau County Police Department, the plaintiff-appellant completed a four-year tour of active duty with the United States Navy, having received an honorable discharge therefrom as well as satisfactorily fulfilling a period of time in the inactive reserves.

Plaintiff-appellant currently seeks to become a member of an authorized Naval reserve unit, plaintiff-appellant being able to retain the rank of "E-5" if plaintiff-appellant can effectuate said affiliation on or before May, 1976.

Pursuant to, and in accordance with, Article VI, Rule 15, of the Rules and Regulations of the Nassau County Police Department, the text of which is hereinafter set forth, defendants-appellees have refused to grant to plaintiff-appellant permission to join said Naval reserve unit, although plaintiff-appellant has duly sought permission from defendants-appellees.

Defendants-appellees have, in their accompanying papers, admitted that they have placed a 100-man limit upon those members of the Nassau County Police Department who, at any one time, can be members of a military reserve force.

It is this arbitrary setting of a 100-man limit as well as the rule and regulation itself upon which defendants-appellees attempt to base credence for their actions that plaintiff-appellant challenges in these proceedings.

Plaintiff-appellant challenged the actions of defendants-appellees by the institution of a lawsuit alleging the violation of his constitutional rights, said proceedings being terminated adversely to plaintiff-appellant. It is from said adverse decision that plaintiff-appellant does herein appeal to this court.

Question Presented.

Whether or not Article VI, Rule 15, of the Rules and Regulations of the Nassau County Police Department as currently implemented by the defendants-appellees is unconstitutional.

Statute and/or Regulation in Question.

Article VI, Rule 15, of the Nassau County Police Department:

> "A member of the Force or Department is prohibited from affiliating with any organization or body, the constitution or regulations of which would in any way exact prior consideration, and prevent him from performing his departmental duties; and he shall immediately advise the Commissioner of Police of any change in his classification in relation to Selective Service, or status concerning his membership in any Federal or State military organization or reserve program."

Argument.

Plaintiff-appellant respectfully submits to this court that the above referenced rule and regulation is in fact an unconstitutional encroachment upon plaintiff-appellant's rights, and, in particular, a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Although defendants-appellees have attempted to justify their actions by stating that they fall within the "rational basis test" as enunciated by the Supreme Court in *McGowan v. Maryland,* 366 U. S. 420 (1960), plaintiff-appellant respectfully submits that in the first instance said "rational basis test" should not be the criteria upon which to judge defendants-appellees' actions herein, and, secondly, should this court feel otherwise, defendants-appellees' actions do not even fall within said "rational basis" criteria.

Plaintiff-appellant respectfully submits to this court that the denial to plaintiff-appellant of his Fourteenth Amendment right to equal protection should be viewed by this court, under the facts and circumstances as herein presented, as a violation of fundamental constitutional guarantees.

In *Shapiro v. Thompson,* 394 U. S. 618, 22 L. Ed. 2d 600, 89 S. Ct. 1322 (1968), it was held that, when it came to fundamental constitutional rights, a governmental entity could not prohibit or place a "chilling effect" upon the exercise of said fundamental constitutional rights unless there could be demonstrated that a compelling governmental interest would be promoted. In *Shapiro v. Thompson, supra,* the court stated:

> "* * * appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional * * *

In addition to expounding this "compelling governmental interest" doctrine as a justification for permitting some limitations to be placed upon the exercise by governmental employees of fundamental constitutional rights, the court in *Keyishan v. Board of Regents of New York,* 385 U. S. 589 (1967), specifically limited this doctrine such that, even if there can be demonstrated that there is a compelling governmental interest to promote, that interest must be promoted by narrowly drawn legislation which will have the least effect upon the exercise of the fundamental constitutional right in issue.

It is based upon the above that plaintiff-appellant respectfully submits to this court that, under the facts and circumstances as herein presented, defendants-appellees' implementation of Article VI, Rule 15, falls within the category of conduct that violates plaintiff-appellant's constitutional guarantees of equal protection and should not be condoned or tolerated by this court.

In the alternative, if this court should feel that the "rational basis test" as enunciated in *McGowan v. Maryland, supra,* is the proper criteria under which defend-

ants-appellees' conduct should be evaluated, then plaintiff-appellant respectfully submits to this court that defendants-appellees' actions do not in fact meet said criteria.

By defendants-appellants' own acknowledgment in their responding papers, the arbitrary setting of the 100-man limit as to Nassau County police officers who can participate at any one time in an active military reserve capacity in effect reduces the man power level of the Nassau County Police Department by 15 men per year (affidavit of Louis J. Frank, p. 2, lines 11-14) submitting in the court below. When this 15-man figure is compared to the fact that there are over 3,800 police officers in the Nassau County Police Department, it becomes readily apparent that the 100-man limit reduces the police force by .39%, a truly insignificant amount. Certainly, for defendants-appellees to take the position that the setting of the 100-man limit, which means a reduction in the police force in personnel available over a year's period of .39%, is certainly not worthy of this court's stamp of approval as meeting the "rational basis" criteria as set forth by the Supreme Court when dealing with infringement of an individual's constitutional guarantees.

The significance of the above referenced statistical factor when viewed in the context of a 3,800 plus Police Department can further be highlighted when it is realized that, under the current Patrolmen's Benevolent Association contract, a member of the Police Department can take one complete day off by donating a pint of blood, the approximate number of days given off by the Police Department in 1975 being in excess of 1,600 man days. Plaintiff-appellant respectfully submits to this court that participating in the military reserves of this country should certainly be a comparable meritorious act as that of giving blood and nowhere is plaintiff-appellant aware

of defendants-appellees attempting to limit the numbers who can participate in said blood donation program.

In addition to the above, members of the Police Department are given a day off if they do not utilize any sick leave within a year's period and men are additionally given days off as a reward for receiving meritorious commendations.

With the above as background, the statistical justification provided in Commissioner Frank's affidavit to meet the "rational basis" criteria for infringement of an individual's constitutional guarantees bears scrutiny and, it is respectfully submitted, should not prove to be persuasive to this court.

For the reasons stated above, this court should determine that Article VI, Rule 15, of the Rules and Regulations of the Nassau County Police Department as currently implemented by the defendants-appellees is in fact unconstitutional.

CONCLUSION.

For the reasons stated above, it is respectfully submitted to this court that the lower court's determination should be overturned.

Respectfully submitted,

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